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ALEXANDER L. STEVAS,
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No. 80-1894

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MICHAEL BEN-LEVI,

Appellant,

v.

SHARON E. BEN-LEVI,

Appellee.

On Appeal from the Superior Court of
the State of New Jersey, Appellate Division

REPLY BRIEF FOR APPELLANT

MICHAEL BEN-LEVI
Appellant, *pro se*
327 North Curson Avenue
Los Angeles, California 90036
(213) 933-0254

TABLE OF AUTHORITIES CITED

CASES

Estin v. *Estin*,
334 U.S. 541 (1948). 4

Halvey v. *Halvey*,
330 U.S. 610 (1947). 4

May v. *Anderson*,
345 U.S. 528 (1953). 4, 5

CONSTITUTION

Constitution of the United States:

Article IV, §1, Full Faith and Credit Clause. 5

Fourteenth Amendment. 2

RULES

Supreme Court of the United States:

Rule 16. 1

STATUTES AND ACTS

Public Law No. 96-611,
94 Stat. 3566 (1980). 3

Uniform Child Custody
Jurisdiction Act (1968). 4

On May 8, 1981 the Appellant filed with this Court a Jurisdictional Statement. The Appellee did not exercise her prerogative under Rule 16 to file an optional response within the prescribed thirty day period.

Two months after the filing of the Jurisdictional Statement, the Clerk of this Court informed the attorney for the Appellee that the Court had requested the filing of a response on or before August 7, 1981. In his letter, the Clerk stated that the "response in appeals normally takes the form of a motion to dismiss or affirm, as provided for in Rule 16 of the rules of this Court."

Though the Appellee did not file a formal response in compliance with the request of this Court, her attorney stated in a letter to the Clerk dated July 17, 1981 that his client had declined to respond because she felt the case did not have those merits which would cause this Court to grant review.

This brief is in reply to the view of the Appellee that the appeal lacks merit. It will also present an analysis of Rule 16. This analysis questions the logical adequacy of its provisions which permit an Appellee to file only a motion to dimiss or affirm.

The provisions of Rule 16.1. are based on a traditional adversary model which automatically assumes that a motion to dismiss an appeal or a motion to affirm the judgment below are the only two responses which serve the best interests of an Appellee. This may not be true in cases involving diversity of citizenship and a conflict of laws between states. In such cases, the maintenance of the *status quo* may continue a stalemate between judgments of two states which are inconsistent and conflicting. The continuation of this legal stalemate

may not serve the best interests of either party. Therefore, rather than a motion to dismiss, it is possible that the best interests of an Appellee, and the interests of justice in general would be better served by an Appellee filing a motion to review the case so that the stalemate and interstate conflict be resolved.

Due to factors inherent in our federal system, state courts of review and this Court are not isomorphic. In cases involving diversity of citizenship and a conflict of laws between states, a federal question may be viewed by this Court with a perspective and under circumstances which could not be present at the time the same federal question was before the courts of a state.

In the instant case the Appellant filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division on February 15, 1980. This Notice of Appeal challenged the constitutionality of three New Jersey statutes whose jurisdictional rules governing the modification of a foreign child custody decree permit their courts without any requirement of a defendant-forum nexus to adjudicate and terminate the custodial rights of a nonresident defendant parent granted under a foreign judgment. The federal question presented in the appeal asked whether the jurisdictional rules contained in those statutes violate the Fourteenth Amendment to the Constitution of the United States by denying procedural due process of law in cases where a forum state does not exercise personal jurisdiction over a nonresident defendant.

Due to the fact the Appellant had virtually no prior contact with the State of New Jersey, the Superior Court of New Jersey invoked *parens patriae* jurisdiction. Consequently, the *ex parte* modification of custody decree which it issued did not automatically

supersede the prior California judgment. At the time the Notice of Appeal was filed and the Brief and Appendix for Appellant reproduced, it was not known whether the Superior Court of California would grant recognition to the New Jersey modification.

Subsequently, the Superior Court of California did not accord full faith and credit to the New Jersey *ex parte* modification, and it reaffirmed its prior judgment. All doubt was thereby eliminated. There now exist two, equally valid, inconsistent and conflicting custody decrees relative to the same children. This emergent factor has added another dimension to the federal question.

When the federal question was before the New Jersey courts, it merely involved an issue of due process relative to the Appellant. The same federal question before this Court now involves an additional issue, a conflict of laws which violates the human rights of the minor children caught between inconsistent and conflicting child custody decrees. Neither custody decree commands greater recognition in other jurisdictions. Therefore, until this conflict is resolved, no law is violated in the event the Ben-Levi children are seized by their father and spirited back to California when they cross New Jersey state lines. The minor children are also subject to being seized by their mother and spirited to New Jersey should they be brought to California and later venture from that state. This legal nightmare must end. Minor children have a constitutional right to the legal protection afforded by one, universally recognized custody decree.

Recognition of this fundamental human right led Congress to enact Public Law 96-611. This statute enacted into federal law the major provisions of the

Uniform Child Custody Jurisdiction Act. One of the stated purposes of that public law is to eliminate inconsistent and conflicting child custody decrees. The jurisdictional requirements of this new legislation and the Uniform Child Custody Jurisdiction Act greatly reduce forum shoppping, but they do not preclude the existence of inconsistent and conflicting custody decrees. Indicative of this is the fact that in the instant case the provisions of the Uniform Child Custody Jurisdiction Act were in effect in each state at the time each respective custody judgment was issued and entered.

It is axiomatic that the process of correctly identifying the source of a problem must precede an effective proposal for its remedy. There is insufficient recognition of the fact that inconsistent and conflicting child custody decrees are the unanticipated and unintended consequences of a constitutional issue which was raised but left unresolved in the *May* v. *Anderson* decision of 1953. 345 U.S. 528.

Child custody decrees have been uniformly held to be subject to modification. A court of competent jurisdiction has the right to modify a custody decree of another state on grounds permitted by the laws of the rendering state. *Halvey* v. *Halvey*, 330 U.S. 610 (1947). Therefore, a judgment modifying an out-of-state custody decree which is rendered by a court of competent jurisdiction supersedes the original decree.

In *May* v. *Anderson, supra,* the Court took under review the proper basis for state-court jurisdiction at custody proceedings. Using *Estin* v. *Estin,* 334 U.S. 541 (1948) as the model, the Opinion of the Court held that without exercising personal jurisdiction over a nonresident parent, a court could not deprive that parent of custody.

That Opinion draws in question the jurisdictional adequacy of *in rem* custody proceedings. On the assumption that the Full Faith and Credit Clause of the Constitution does not require recognition of a judgment rendered by a court with a jurisdictional defect, the Opinion of the Court in *May* concluded that sister states are not required to accord full faith and credit to an *ex parte* custody judgment.

Only a plurality of Justices held that view. In a concurring opinion, Justice Frankfurter merely endorsed the conclusion. This created a majority rule that a sister state is not required to recognize an out-of-state *ex parte* custody decree. It should be noted in *May* that it was the initial award of custody which was *ex parte*, and the second forum state exercised personal jurisdiction over both parents. Therefore, the modification rendered by the second forum state superseded the original decree.

Two, equally valid, inconsistent and conflicting custody decrees are the unanticipated and unintended consequences of the *May* decision. This occurs when an *ex parte* custody decree is issued by a second forum state at modification proceedings, and the court of original jurisdiction refuses to accord that judgment full faith and credit. The *May* decision has it both ways. A second forum state can assume *in rem* jurisdiction and issue an *ex parte* modification of custody decree, and the state which rendered the initial decree is allowed to deny recognition to that modification.

There is an urgent need to resolve this anomaly which has created tragedy and trauma in the lives of countless children. The instant case provides this Court with a rare opportunity to rule on the unanswered federal question responsible for this legal dilemma.

If *in rem* jurisdictional rules at modification of custody proceedings are consistent with due process of law, then the court of original jurisdiction has no basis in law for denying full faith and credit to an *ex parte* modification of custody decree. On the other hand, if *in rem* jurisdictional rules governing the modification of custody are not consistent with procedural due process of law, then a forum state not exercising personal jurisdiction over a nonresident defendant parent should be denied jurisdiction to modify an out-of-state decree unless the plaintiff can append to the complaint an order rendered by the forum of the defendant declaring that the best interests of the child(ren) call for the forum of the plaintiff to assume jurisdiction. Which ever way this Court rules, one and only one custody decree will be valid at any given time.

The case load of this Court is limited; therefore, only the most substantial federal questions can be taken under submission. The issue of inconsistent and conflicting child custody decrees is a new American tragedy which cries out for resolution. Indication of this sentiment is the unanimous support for the resolution of this problem shown by the broad spectrum of the Southern California religious community. Messages urging this Court to note probable jurisdiction are being sent.

Dated: August 19, 1981.

Respectfully submitted,

MICHAEL BEN-LEVI
Appellant, *pro se*
327 North Curson Avenue
Los Angeles, California 90036
(213) 933-0254